Appendix A

United States District Court
Northern District of California

No. C781410 WHO

Dale F. Meyer, on behalf of himself and all others similarly situated,
Plaintiff,

v.

Thomson & McKinnon Auchincloss Kohlmeyer, Inc., a New York corporation, et al.,
Defendants.

[Filed Mar. 20, 1979]

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The motions of defendants to dismiss plaintiff's complaint, pursuant to Rule 12(b)(1) & (6) and for summary judgment, pursuant to Rule 56, and plaintiff's motion for partial summary judgment, came on regularly for hearing on December 8, 1978. The court having received and reviewed the papers filed in support and opposition thereto, and having heard the arguments of counsel, took the matter under submission; by Order filed January 16, 1979, the court ordered a further hearing with respect to specified issues, to be treated as defendants' motions for summary judgment, pursuant to which the parties filed additional memoranda of points and authorities. Thereafter said

motions came on for hearing on March 9, 1979, plaintiffs appearing through Thomas M. Boehm, of Matthews and Marzulla, defendants UCA Systems and Gerald P. Kooyers by Richard S. Burriss of Jones & Burriss, and defendants Thomson McKinnon Securities Inc. and James L. Miller by Bruce W. Belding and Jeffrey Kirchmann of Dinkelspiel & Dinkelspiel; the court having reviewed the memoranda of points and authorities and affidavits filed in support of and in opposition to the motions, and good cause appearing,

IT IS HEREBY ORDERED:

1. That the motions of defendants to dismiss the complaint and for summary judgment be, and they hereby are, granted;

2. That plaintiff's motion for partial summary judgment be, and it hereby is, denied;

3. That the pendent state law claims asserted in the Eleventh and Twelfth Counts be, and they hereby are, dismissed under the doctrine of *United Mine Workers v. Gibbs*;

4. That plaintiff's complaint be, and it hereby is, dismissed;

5. That judgment be entered in favor of defendants and against plaintiff, with costs and disbursements to be taxed by the Clerk.

Dated: Mar 20 1979.

William H. Orrick

Judge, United States District Court

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 79-4323
DC #C78-1410 WHO
Northern California

Dale F. Meyer, on behalf of himself
and all others similarly situated,
Plaintiff/Appellant,

vs.

Thomas & McKinnon Auchincloss
Kohlmeyer, Inc., et al.,
Defendants/Appellees.

[Filed September 9, 1982]

OPINION

Appeal from the United States District Court
for the Northern District of California
Honorable William H. Orrick, District Judge, Presiding

Argued and submitted October 14, 1980
Submission withdrawn March 25, 1981.
Resubmitted June 2, 1982

Before: SKOPIL and POOLE, Circuit Judges, and HALBERT, Senior District Judge.*

POOLE, Circuit Judge.

Meyer appeals a summary judgment and dismissal of his complaint against UCA Systems, Inc. (UCA), a commodi-

*The Honorable Sherrill Halbert, Senior United States District Judge for the Eastern District of California, sitting by designation.

ties advisor, Thomson McKinnon Securities, Inc. (Thomson), a securities and commodities brokerage firm formerly known as Thomson & McKinnon Auchincloss Kohlmeyer, Inc., and two individuals associated with those companies.

Thomson sold Meyer a discretionary commodities trading account that was to be managed by UCA. When the account proved unsuccessful, Meyer withdrew his funds. He later brought a complaint, asserted as a class action, alleging that the accounts sold by Thomas [sic] and UCA to himself and other members of his putative class were securities under 15 U.S.C. § 77(b), that these securities were not registered as required by 15 U.S.C. § 77(e), and that Meyer and other members of the putative class were therefore entitled to rescission under 15 U.S.C. § 77(1). Various other claims were raised whose validity depended upon a determination that the commodities accounts were "securities" under the federal securities law. The district court held that they were not. We affirm.

Jurisdiction

Appellees claim that the matter was not properly before the district court because jurisdiction over this action rests exclusively in the Commodities Exchange Commission. We have today decided that the district court retains jurisdiction over private actions arising out of commodities transactions. *Mordaunt v. Incomco*, ... F.2d ....., No. 78-3499 (9th Cir. 1982). *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, ... U.S. ....., 102 S.Ct. 1825 (1982).

"Securities"

The sole question presented for review here is whether the discretionary commodities account sold to Meyer was an "investment contract" and therefore a "security" within

the meaning of 15 U.S.C. § 77(b). In order to constitute an investment contract, the account must be a "common enterprise." *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). This question is controlled by the holdings in *Mordaunt* and *Brodt v. Bache & Co.*, 595 F.2d 459 (9th Cir. 1978). In each case, this court has determined that discretionary commodities trading accounts were not common enterprises on facts indistinguishable from those presented here.

Meyer attempts to distinguish *Brodt* by drawing attention to the fee structure employed by UCA with respect to his account. UCA exacted a quarterly commission based upon a percentage of the assets managed in a given quarter, payable in advance and not refundable in the event that the investor closed his account before the quarter's end.

Meyer argues that by this arrangement UCA shared in his profits and losses and was therefore engaged in a common enterprise with him. We disagree. Plainly, just as in *Mordaunt* and *Brodt*, the promoter continued to profit through commissions even as the account lost money. On the other hand, had the account been successful, the promoter would not necessarily have shared the benefits because Meyer could elect to withdraw profits as they accrued. Judged in light of economic realities, this account was no different from those at issue in *Mordaunt* and *Brodt* and therefore does not qualify as a security within the meaning of 15 U.S.C. § 77(b).

The judgment of the district court is AFFIRMED.

Appendix C

United States Court of Appeals for the Ninth Circuit
William L. Whittaker, Clerk U.S. District Court
Northern District of California

No. 79-4323
DC CV 78-1410 WHO

Dale F. Meyer, on behalf of himself and all others similarly situated,
Plaintiff/Appellant,

vs.

Thomas & McKinnon Auchincloss, Kohlmeyer, Inc., et al.,
Defendants/Appellees.

[Filed Oct 7 1982]

Appeal from the United States District Court for the Northern District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 09, 1982

A True Copy
Attest Oct 1 - 1982
Phillip B. Winberry
Clerk of Court
by:
Deputy Clerk

Exhibit "B"

Appendix D

Supreme Court of the United States
No. A-442

Dale F. Meyer, Etc.,
Petitioner,

v.

Thompson McKinnon Securities, Inc., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner.

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 14, 1983.

/s/ William H. Rehnquist
Associate Justice of the Supreme Court of the United States

Dated this 17th day of November, 1982

Appendix E

Section 2, Securities Act of 1933, 15 U.S.C. § 77b(1):

> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, pre-organization certificate or subscription, transferrable share, *investment contract*, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any the foregoing. (Emphasis added.)

Section 5, Securities Act of 1933, 15 U.S.C. § 77e(c):

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . .